

Title 122 - NEBRASKA DEPARTMENT OF ENVIRONMENTAL QUALITY

Chapter 13 - FINANCIAL RESPONSIBILITY

001 General Requirements

001.01 Each application for a permit or a renewal shall be accompanied by a written estimate of the costs to undertake environmental protection measures necessary to prevent contamination of ground water having 10,000 mg/l or less TDS during and after the cessation of operations. These measures shall include, but are not limited to:

001.01A The proper closing, plugging, and abandonment of a well(s);

001.01B The proper disassembly, decontamination, and restoration of the aquifer site;

001.01C The probable difficulty of completing the requirements of 001.01A and 001.01B above, due to such factors as topography, geology of the site, and hydrology;

001.01D Any post-operational monitoring as may be required by the Environmental Protection Act, the regulations of this title, and/or the permit; and

001.01E Additional estimated costs to the State which may arise from applicable public contracting requirements or the need to bring personnel and equipment to the permit area to complete the restoration after its abandonment by the permittee.

001.02 After the submission of the estimate and as a prerequisite to commencing operations, the Department shall require the applicant to provide evidence, to its satisfaction, of financial responsibility that moneys are available in an amount estimated by the Director to be sufficient to undertake the measures specified in Section 001.01 above.

001.03 In determining the amount of financial assurance, in addition to the requirements of Sections 001.01 and 001.02 of this Chapter, the Director shall consider the prior history of environmental activities of the applicant as submitted pursuant to Chapter 11, Sections 006.06 and 006.08.

001.04 Each owner or operator shall keep its evidence of financial responsibility on file with the Department current and accurate. Any change in the form or nature of an owner's or operator's method of maintaining the financial responsibility required shall be filed with and approved by the Department prior to any such change.

001.05 Evidence of financial responsibility does not operate to any extent as a limitation upon the obligation of the owner or operator to comply with its permit or complete any restoration.

001.06 Failure of the permit applicant to provide evidence of financial responsibility shall be sufficient cause for withholding issuance of a permit or the revocation of an existing permit.

001.07 Class V wells authorized in Chapter 6 of this Title may not be required to fulfill the requirements of this Chapter.

002 Methods of Providing Financial Responsibility

002.01 The applicant shall choose among the following options in establishing financial responsibility:

002.01A An Environmental Protection Trust. An owner or operator may satisfy the requirements of this Chapter by establishing an Environmental Protection Trust. This stand-by trust shall be sufficient to compensate for all the environmental protection costs as specified in section 001 of this Chapter. An Environmental Protection Trust must fulfill the requirements in Section 004 of this Chapter;

002.01B A surety bond guaranteeing payment into an Environmental Protection Trust. This bond must be worded as in Appendix II of this Title and would work in tandem with the stand-by Trust provided for in Section 002.01A of this Chapter. A surety bond must comply with the requirements in Section 005 of this Chapter;

002.01C A collateral bond, in which case the applicant shall deposit, with a bank acceptable to the Department, cash, negotiable bonds issued by the United States or the State; or negotiable certificates of deposit; or deliver to the Department an irrevocable letter of credit of any banks or other savings institution organized or transacting business in the United States. The bank shall receive and hold any collateral bond in the name of the State, in trust, for the purposes for which the deposit is posted. The applicant shall pay all costs of the trust, and shall be paid all interest accruing to the account of the trust. A collateral bond must fulfill the requirements in Section 006 of this Chapter;

002.01D An established escrow account;

002.01E A bond of the applicant without separate surety upon a satisfactory demonstration to the Director that such applicant has the financial means sufficient to self-bond pursuant to bonding requirements specified in Section 009 of this Chapter; or

002.01F Any combination of the above.

003 Replacement of Financial Assurance

003.01 The Director may allow the owner or operator to replace approved financial assurance with another type of financial assurance described in 002 above, if the liability which has accrued against the owner or operator on the permit, is transferred to such replacement.

003.02 The Director shall not release existing financial assurance until the owner or operator has submitted and the Director has approved an acceptable replacement.

004 The Environmental Protection Trust.

004.01 An owner or operator of a underground injection well, except for Class II and V, may submit an originally signed trust agreement to the Director with the permit application. The trustee shall be an entity which has the authority to act as a trustee and whose trust

operations are regulated and examined by a Federal or State agency.

004.02 The wording of the trust agreement shall be identical to the wording specified in Appendix I and accompanied by a formal certification of acknowledgment as illustrated in said Appendix. Schedule A of the trust agreement shall be updated within 60 days of a change in the amount of the environmental protection measures cost (EPMC), covered by the agreement.

004.03 Payments into the trust fund shall be made annually by the owner or operator over the term of the initial permit or over the remaining life of the mineral injection well(s) as stated in the Environmental Protection Measures Costs (EPMC) estimate (See Section 001.01 of this Chapter), whichever period is shorter. This period is hereafter referred to as the "pay-in period". The payments into the Environmental Protection Trust Fund shall be made as follows:

004.03A For a new well(s), the first payment shall be made before the initial injection into the well(s). A receipt from the trustee for this payment shall be submitted by the owner or operator to the Director before the first injections are made. The first payment shall be at least equal to the estimate of EPMC, divided by the number of years in the pay-in period. Subsequent payments shall be made no later than 30 days after each anniversary date of the first payment. The amount of each subsequent payment shall be determined by this formula:

$$\text{Next Payment} = \frac{\text{EPM} - \text{CV}}{\text{Y}}$$

where EPM is the current EPMC estimate, CV is the current value of the trust fund and Y is the number of years remaining in the pay-in period.

004.03B If an owner or operator establishes a trust fund as specified in Section 004.01 of this Chapter, and the value of that trust fund is less than the current EPMC estimate when a permit is awarded for the injection well(s), the amount of the cost estimate still to be paid into the trust fund shall be paid in over the pay-in period, as defined in Section 004.03A above.

004.04 The owner or operator may accelerate payments into the trust fund or he or she may deposit the full amount of the current EPMC estimate at the time the fund is established. However, he or she shall maintain the value of the fund at no less than the value that the fund would have if annual payments were made as required by Section 004.03A above.

004.05 If the owner or operator establishes an Environmental Protection Trust Fund after having used one or more alternate mechanisms for financial assurance specified in Section 002 of this Chapter, his or her first payment shall be in at least the amount that the fund would contain if the trust fund were established initially and annual payments made according to the specifications of Section 004.03A above.

004.06 After the pay-in period is completed, or whenever the EPMC estimate changes, the owner or operator shall compare the new estimate with the trustee's most recent annual valuation of the trust fund. If the value of the fund is less than the amount of the new

estimate, the owner or operator, within 60 days after the change in the cost estimate, shall either deposit an amount into the fund so that its value after this deposit at least equals the amount of the current EPMC estimate, or obtain other financial assurance as specified in Section 002 of this Chapter to cover the difference.

004.07 If the value of the trust fund is greater than the total amount of the current EPMC estimate, the owner or operator may submit a written request to the Director for release of the amount in excess of the current EPMC estimate.

004.08 If an owner or operator substitutes other financial assurance as specified in this section for all or a part of the trust fund, the owner or operator may submit a written request to the Director for release of the amount, if any, in excess of the current EPMC estimate covered by the trust fund.

004.09 Within 60 days after receiving a request from the owner or operator as specified in Sections 004.07 and 004.08 of this Chapter, the Director will instruct the trustee to release to the owner or operator such funds as the Director specifies in writing.

004.10 After beginning final operations for the environmental protection measures specified in Sections 001.01A to 001.01D of this Chapter an owner or operator or any other person authorized to perform such acts may request reimbursement for expenditures for such acts by submitting itemized bills to the Director. Within 60 days after receiving bills for any of such items, the Director will determine whether the expenditures are in accordance with the permit or otherwise justified, and if so, he or she will instruct the trustee to make reimbursements in such amounts as the Director specifies in writing. If the Director has reason to believe that the cost of such measures will be significantly greater than the value of the trust fund, he or she may withhold reimbursement of such amounts as he or she deems prudent until he or she determines in accordance with Section 004.11 below, that the owner or operator is no longer required to maintain financial assurance for environmental protection measures as specified in Sections 001.01A to 001.01E of this Chapter.

004.11 The Director will agree to termination of the trust when:

004.11A An owner or operator substitutes alternate financial assurance as specified in this Chapter; or

004.11B Within 60 days from receiving certifications from the owner or operator and independent registered professional engineer that the measures specified in Sections 001.01A to 001.01D of this Chapter have been accomplished in accordance with the permit, the Director notifies the owner or operator in writing that financial assurance is no longer required to be maintained unless the Director has reason to believe that the environmental protection measures have not been in accordance with the permit.

005 Surety Bond Guaranteeing Payment Into An Environmental Protection Trust Fund.

005.01 An owner or operator shall satisfy the requirements of this section by obtaining a surety bond which conforms to the requirements of this section and submitting the bond to the Director with the application for a permit or for approval to operate under rule. The bond must be effective prior to injection. The surety company shall, at a minimum, be

among those listed as acceptable sureties on Federal bonds in Circular 570 of the U.S. Department of the Treasury.

005.02 The wording of the surety bond shall be identical to the wording in Appendix II.

005.03 The owner or operator who uses a surety bond to satisfy the requirements of this section shall also establish a standby Environmental Protection Trust fund. Under the terms of the bond, all payments made thereunder will be deposited by the surety directly into the standby trust fund in accordance with instructions from the Director. This standby trust fund shall meet the requirements specified in Section 004 of this Chapter, except that:

005.03A An originally signed duplicate of the trust agreement shall be submitted to the Director with the surety bond; and

005.03B Until the standby trust fund is funded pursuant to the requirements of this section, the following are not required:

005.03B1. Payments into the trust as specified in Section 004.03 of this Chapter;

005.03B2. Updating of Schedule A of the Trust Agreement to show current EPMC estimates;

005.03B3. Annual valuations as required by the trust agreement; and

005.03B4 Notices of nonpayment as required by the trust agreement.

005.04 The bond shall guarantee that the owner or operator will:

005.04A Fund the standby trust fund in an amount equal to the penal sum of the bond before beginning the environmental protection measures enumerated in Section 001.01 of this Chapter;

005.04B Fund the standby trust fund in an amount equal to the penal sum within 15 days after an order to begin section 001.01 environmental protection measures is issued by the Director or a district court of competent jurisdiction; or

005.04C Provide alternate financial assurance as specified in this Chapter, and obtain the Director's written approval of the assurance provided, within 90 days after receipt by both the owner or operator and the Director of a notice of cancellation of the bond from the surety.

005.05 Under the terms of the bond, the surety will become liable on the bond obligation when the owner or operator fails to perform as guaranteed by the bond.

005.06 The penal sum of the bond shall be in an amount at least equal to the current EPMC estimate.

005.07 Whenever the current EPMC estimate increases to an amount greater than the penal sum, the owner or operator, within 60 days after the increase, shall either cause the penal

sum to be increased to an amount at least equal to the current EPMC estimate and submit evidence of such increase to the Director, or obtain other financial assurance as specified in this section to cover the increase. Whenever the current EPMC estimate decreases, the penal sum may be reduced to the amount of the current EPMC estimate following written approval by the Director.

005.08 The bond may be subject to cancellation by the surety company; provided that, no such cancellation, nor release of the surety company's liability under the bond, shall be effective sooner than one hundred twenty days following receipt by the Department and the permittee of written notice of cancellation sent by certified mail, return receipt requested. Such one hundred twenty day period shall be measured from the later of either the receipt by the Department or permittee of such notice. In the event of cancellation, the permittee must provide evidence of a replacement bond no later than forty-five days prior to the effective date of cancellation specified in the notice. The effective date of the replacement bond shall be no later than the effective date of cancellation. Failure of the permittee to obtain a replacement bond shall result in forfeiture of its bond.

005.09 The owner or operator may cancel the bond if the Director has given prior written consent based on his or her receipt of evidence of alternate financial assurance as specified in this section.

006 Collateral bonds, except for letters of credit, shall be subject to the following conditions:

006.01 The Director shall value collateral at its current market value, not face value.

006.02 The Director shall only accept certificates of deposit which are automatically renewable.

007 Irrevocable standby letters of credit shall be subject to the following conditions:

007.01 The letter shall be payable to the State of Nebraska in part or in full upon demand and receipt from the Director of a notice of forfeiture pursuant to section 011 of this Chapter.

007.02 The letter shall contain terms which authorize the Director to draw upon the letter, in full, to obtain cash collateral in the event the owner or operator has failed to furnish replacement financial assurance at least 30 days prior to the expiration of the letter, and shall be worded as specified in Appendix III.

007.03 The total amount of letters of credit that will be accepted from any bank for any owner or operator, on all permits held by the owner or operator, shall not exceed the bank's maximum legal lending limit as required by the Nebraska Department of Banking or Federal banking regulatory agency.

007.04 The bank shall give prompt notice to the owner or operator and the Director of any notice received or action filed alleging the insolvency or bankruptcy of the bank, or alleging any violations of regulatory requirements which could result in suspension or revocation of the bank's charter or license to do business;

007.05 In the event the bank becomes unable to fulfill its obligations under the letter of credit for any reason, notice shall be given immediately to the owner or operator and the Director.

007.06 Upon the incapacity of a bank by reason of bankruptcy, insolvency, or suspension or revocation of its charter or license, the owner or operator shall obtain a replacement financial assurance within 45 days. Failure of the owner or operator to obtain replacement financial assurance shall result in revocation of its permit.

008 Established escrow accounts shall be subject to the following conditions:

008.01 The escrow account shall be drawn solely in favor of the State of Nebraska with a bank or lending company chartered by or licensed to operate in the State of Nebraska as escrow agent and in an amount to reimburse the State of Nebraska in the event of abandonment, default, or other inability of the owner or operator to meet the conditions imposed in Section 001.01 of this Chapter.

008.02 The escrow account shall be drawn containing terms which authorize the Director to draw upon the account partially or in full, to obtain cash collateral for the purposes of Section 007.01 of this Chapter.

008.03 The total amount of the escrow account shall remain intact and free of any other encumbrance by the owner or operator or the escrow agent holding the same for the benefit of the State of Nebraska.

008.04 Upon the incapacity of the escrow agent by reason of bankruptcy, insolvency or suspension or revocation of its charter or license, the owner or operator shall obtain replacement financial assurance within 45 days. Failure of the owner or operator to obtain replacement financial assurance shall result in revocation of its permit.

009 Owner or operator's bond without separate surety shall be subject to the following conditions:

009.01 The owner or operator may satisfy the requirements of this section by demonstrating that it passes the financial test as specified in this paragraph. To pass this test the permittee shall meet the criteria of either 009.01A or 009.01B of this Section:

009.01A The owner or operator shall have:

009.01A1. Two of the following three ratios: a ratio of total liabilities to net worth less than 2.0 ; a ratio of the sum of net income plus depreciation, depletion, and amortization to total liabilities greater than 0.1; and a ratio of current assets to current liabilities greater than 1.5;

009.01A2. Net working capital and tangible net worth each at least six times the sum of the current EPMC estimate;

009.01A3. Tangible net worth of at least \$10 million; and

009.01A4. Assets in the United States amounting to at least 90 percent of its total assets or at least six times the sum of the current EPMC estimate.

009.01B The owner or operator shall have:

009.01B1. A current rating for its most recent bond issuance of at least AAA, AA, A or BBB as issued by Standard and Poor's or Aaa, Aa, A or Baa as issued by Moody's;

009.01B2. Tangible net worth at least six times the sum of the current EPMC estimate;

009.01B3. Tangible net worth of at least \$10 million; and

009.01B4. Assets located in the United States amounting to at least 90 percent of its total assets or at least six times the sum of the current EPMC estimates.

009.02 The phrase "EPMC estimate" as used in this section refers to the cost estimate required to be shown in Appendix IV (the letter to the Director from the owner or operator's chief financial officer).

009.03 To demonstrate that it meets this test, the owner or operator shall submit the following items to the Director:

009.03A A letter signed by the owner or operator's chief financial officer and worded as specified in Appendix IV;

009.03B A copy of an independent certified public accountant's report on examination of the owner or operator's financial statements for the latest completed fiscal year;

009.03C A special report from the owner or operator's independent certified public accountant to the owner or operator that:

009.03C1. He or she has compared the data which the letter from the chief financial officer specifies as having been derived from the independently audited, year-end financial statements for the latest fiscal year with the amounts in such financial statements; and

009.03C2. In connection with that procedure, no matters came to his or her attention, which caused him or her to believe that the specified data should be adjusted.

009.04 An applicant for a permit for a new injection well shall submit the items specified in 009.03 of this Section to the Director within 90 days after the close of each succeeding fiscal year.

009.05 After the initial submission of items specified in 009.03 of this Section, the owner or operator shall send updated information to the Director within 90 days after the close of

each succeeding fiscal year. The information shall consist of all three items specified in 009.03 of this Section.

009.06 If the owner or operator no longer meets the requirements of 009.01 of this Section, he or she shall send notice to the Director of intent to establish alternate financial assurance as specified in Section 004 through 008 of this Chapter. The notice shall be sent by certified mail within 90 days after the end of the fiscal year for which the year-end data show that the owner or operator no longer meets the requirements. The owner or operator shall provide alternate financial assurance within 45 days after the end of such fiscal year.

009.07 The Director may, based upon a reasonable belief that the owner or operator may no longer meet the requirements of 009.01 of this Section, require reports of financial condition at any time from the owner or operator in addition to those specified in 009.03 of this Section. If the Director finds on the basis of such reports or other information, that the owner or operator no longer meets the requirements of 009.01 of this Section, the owner or operator shall provide alternate financial assurance within 45 days after notification of such a finding.

009.08 The Director may disallow use of this test on the basis of qualifications in the opinion expressed by the independent certified public accountant in his report on the owner or operator's financial statement (See 009.03B of this Section). An adverse or disclaimer of opinion will be cause for disallowance. The Director will evaluate other qualifications on an individual basis. The owner or operator must provide alternate financial assurance as specified in this Chapter within 45 days after notification of the disallowance.

009.09 The owner or operator is no longer required to submit the items specified in 009.03 of this Section when:

009.09A The owner or operator substitutes alternate financial assurance as specified in this Chapter; or

009.09B The Director releases the owner or operator from the requirements of this Section in accordance with Section 010 of this Chapter.

010 Release of Financial Assurance

The owner or operator may file a request with the Director for the release of all or part of its financial assurance. Following public notice, the Director shall release its financial assurance, in whole or in part, when he or she is satisfied any restoration covered by the financial assurance or portion thereof has been accomplished as required by these regulations.

011 Forfeiture of Financial Assurance

011.01 The Director shall declare all or any appropriate part of financial assurance for any permit as forfeited if he or she determines that:

011.01A The owner or operator has violated any of the terms or conditions of its permit and/or financial assurance and has failed to take adequate corrective action; or

011.01B The owner or operator has failed to conduct its operations in accordance with the Nebraska Environmental Protection Act, these regulations and the permit within the time required, and that it is necessary, in order to fulfill the requirements of the permit and any restoration, plugging or abandonment, to have someone other than the owner or operator correct or complete such work.

011.02 The Director may withhold declaration of forfeiture if the owner or operator and surety, escrow agent, or other person responsible for financial assurance agree to a compliance schedule to comply with the violations of the financial assurance or permit conditions.

011.03 In the event a determination to forfeit financial assurance is made, the Director shall:

011.03A Send written notification by certified mail, return receipt requested, to the owner or operator and the surety, escrow agent, or other person responsible for financial assurance of the Director's determination to forfeit all or part of the financial assurance and the reasons for the forfeiture, including a finding of the amount to be forfeited;

011.03B The owner or operator may request a hearing on the issue of whether the financial assurance, or part thereof, shall be forfeited in accordance with the procedures specified in Neb. Rev. Stat. §§ 81-1507(1)(2) and Title 115 of the Department's Rules of Practice and Procedure.

011.03C An appeal from a final decision of the Director shall be in accordance with Neb. Rev. Stat. §§ 81-1509.

Enabling Legislation: Neb. Rev. Stat. §§ 81-1505(9)(c), (21)(a)(b) and (c)

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